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7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA

9 MICHAEL J. CONLON,

10 Plaintiff,

11 v.

12 UNITED STATES OF AMERICA,

13 Defendants.

CV-N-01-0700-DWH-VPC

REPLY MEMORANDUM IN FURTHER
SUPPORT OF DEFENDANTS'
RENEWED MOTION TO DISMISS
OR, IN THE ALTERNATIVE, FOR
SUMMARY JUDGMENT14 Comes now the United States of America, through its undersigned counsel, and submits
15 its reply memorandum in further support of its renewed motion to dismiss or for summary
16 judgment (#62).17 As noted in the United States' renewed motion, the only defendant remaining in this case
18 is the United States and the only claim remaining is an action under the Federal Tort Claims
19 Act (FTCA). See Stipulation for Dismissal, etc. (#53). The United States previously sought
20 dismissal of the FTCA claim on the grounds that such claim was barred by the statute of
21 limitations and also sought, alternatively, summary judgment (#44). No disposition of that
22 motion was made due to an effort by the parties to schedule another settlement conference. That
23 effort having failed due to plaintiff's failure to appear for the settlement conference,¹ the United
24 States renewed its previous motion to dismiss or for summary judgment.25
26
27 ¹ Although plaintiff has requested several settlement conferences and such
28 conferences have been scheduled, plaintiff has failed to appear for any such conference.

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Plaintiff opposes the renewed motion, arguing that the statute of limitations does not bar the FTCA action and further arguing that summary judgment is precluded by unspecified material issues of fact. As discussed below, plaintiff's opposition betrays a fundamental misunderstanding of the claim which is made against the United States under the FTCA.

1. Statute of Limitations

In its renewed motion for dismissal, the United States argued that plaintiff's FTCA claim for false arrest accrued in February 1998 (when he was arrested) and that his July 1991 administrative claim was untimely (beyond the two-year limitations period). In response, plaintiff argues that "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." See Opposition memorandum, p.2, lines 27-ff. Plaintiff cites Heck v. Humphrey, 512 U.S. 477 (1994) to support his statement concerning the accrual of a cause of action under 42 U.S.C., section 1983. Plaintiff offers no other analysis concerning the United States' statute of limitations defense.

The difficulty with plaintiff's "analysis" is that this is not an action under § 1983, has never been an action under § 1983, and can not be construed as an action under § 1983. Accordingly, there is no basis to evaluate the accrual of plaintiff's FTCA cause of action using principles applicable to § 1983 actions.

The second amended complaint (#42) makes no mention of a claim under 42 U.S.C., section 1983. Moreover, even if a § 1983 claim had been alleged (which it was not), all claims other than an FTCA claim for false arrest against the United States were dismissed upon stipulation of the parties approved by the Court (#53). Moreover, no § 1983 claim can be asserted against the United States (or its agencies and employees) because § 1983, by its terms, imposes liability only against persons acting under color of state law. FDIC v. Meyers, 510 U.S. 471 (1994); Daly-Murphy v. Winston, 837 F.2d 348 (9th Cir. 1984); see also Gomez v. Toledo, 446 U.S. 635 (1980). There is, accordingly, no conceivable basis for the suggestion that a

1 section 1983 claim is pending in this action against the United States. There being no section
2 1983 claim pending in this action, plaintiff's discussion of the statute of limitations analysis
3 pertinent to a section 1983 claim is wholly inapplicable to the United States' motion.

4 Nor does plaintiff's section 1983 analysis apply by analogy to this FTCA claim for false
5 arrest (and plaintiff does not argue in favor of such an analogy). In Heck v. Humphrey, id., the
6 question before the Supreme court was whether a claim for money damages arising out of an
7 unlawful conviction could be pursued under section 1983. Heck, 512 U.S. at 480, fn.2. The
8 Supreme Court analogized the wrongful conviction claim to a malicious prosecution claim and
9 explicitly differentiated it from a false arrest claim or false imprisonment claim. Id., 512 U.S. at
10 484. The Supreme Court held that a § 1983 claim for damages arising out of an allegedly
11 unconstitutional conviction or imprisonment, or for other harm cause by actions whose
12 unlawfulness would render a conviction or sentence invalid, a plaintiff must prove that the
13 conviction or sentence has been reversed on direct appeal, expunged by executive order, declared
14 invalid by a state tribunal authorized to make such determinations, or called into question by a
15 federal court's issuance of a writ of habeas corpus. Id., 512 U.S. at 486-87.

16 The Heck analysis is inapplicable to this case because plaintiff's claim under the FTCA is
17 for false arrest, not for malicious prosecution or for acts whose unlawfulness would render the
18 imprisonment invalid. Rather, plaintiff's claim arises out of an alleged error in the computation
19 of a parole period under the "old" parole system, a computation which resulted in the issuance of
20 an arrest warrant and plaintiff's arrest in February 1998 when he violated the terms of his parole.
21 Plaintiff's "false arrest" claim under the FTCA accrued at that time rather than when plaintiff
22 was released in August 2001 because all of the events which resulted in his "false" arrest
23 occurred on or before the date of his arrest.²

24
25 ² Plaintiff's argument regarding the accrual of his FTCA claim is also inconsistent
26 with the timing of his administrative claim. The administrative claim was presented in July
27 2001, a date which would be before the claim accrued using plaintiff's accrual date of August
28 2001 when he was released.

1 For the foregoing reasons, this FTCA action against the United States must be dismissed
 2 because plaintiff failed to file a timely administrative tort claim, a jurisdictional requirement
 3 under the FTCA.

4
 5 2. Alternatively, Summary Judgment Should Be Granted

6 In opposition to the United States' alternative motion for summary judgment, plaintiff
 7 argues that a fact issue remains concerning "the extent to which Plaintiff's parole hearings were
 8 conducted in good faith." See Opposition memorandum, p.3. Plaintiff fails, however, to submit
 9 any affidavits or other evidentiary materials which would support a finding favorable to plaintiff.
 10 It is wholly inadequate to simply "argue" the existence of various abstract "facts" to oppose an
 11 otherwise factually-supported motion for summary judgment.

12 There is no evidentiary support for a finding of negligence against the United States in
 13 this FTCA action. Plaintiff contends that he was incarcerated "too long" because his parole
 14 status was improperly evaluated by the U.S. Parole Commission (which issued the arrest
 15 warrant). The dispute concerning the Parole Commission's evaluation of plaintiff's parole status
 16 was a legal dispute which eventually was adjudicated favorably to plaintiff in habeas corpus
 17 proceedings in the District of Arizona, when that court accepted plaintiff's legal position as
 18 correct and ordered plaintiff released from custody. That finding, however, does not
 19 automatically provide a viable claim for damages under the FTCA.

20 Accordingly, summary judgment should be entered against plaintiff and in favor of the
 21 United States regarding the only claim which remains in this litigation, the claim for false arrest
 22 under the FTCA.

23 Respectfully submitted,

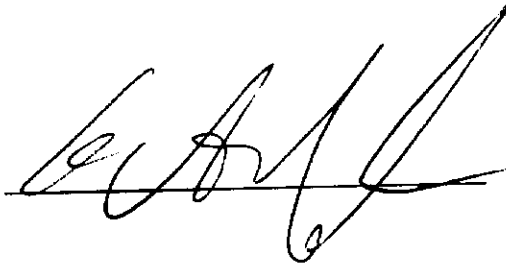
24 DANIEL G. BOGDEN
 25 United States Attorney

26 GREG ADDINGTON
 27 Assistant United States Attorney
 28

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing REPLY MEMORANDUM IN FURTHER
SUPPORT OF DEFENDANTS' RENEWED MOTION TO DISMISS OR, IN THE
ALTERNATIVE, FOR SUMMARY JUDGMENT was mailed by first-class mail, postage pre-
paid, on March 11, 2004:

James Andre Boles, Esq.
618 South Center Street
Reno, NV 89501

A handwritten signature in black ink, appearing to read 'J. Boles', written over a horizontal line.

3/12/2004

Submission Memo

Case Number		Caption				Date Filed	Nat/Suit
CR-N-98-0148 - HDM - PHA		USA VS Robert H. Cosby				08/05/1999	
						WAYNE JULIAN	
Sub Date	Doc	Judge	Type Status	Age	Document Type Document Name	Description	
03/20/2004	105	DW	Due Not Comp	8	MINUTES OF PROCEEDINGS HEARING	Revoc Hearing cont to 3/16/04 2pm.	
05/01/2004	103	HDM	Due Not Comp	22	SUMMONS ISSUED	chk status of summons issd re doc #102 as to Cosby	
10/10/2004	102	HDM	Due Not Comp	23	ORDER PETITION	chk status of pet revoke spsvsd rels	
02/27/2006	96		Due Not Comp	379	ORDER	ck for retn of exhibits.	
03/12/2004	104	HDM	Sub Sub	9	MEMORANDUM	memo in spt of #102 obo Govt; #106-suppl; #107-oppo; reply due	

COMMENTS
